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7 *Co-Lead/Liaison Counsel for Plaintiffs*

8 UNITED STATES DISTRICT COURT

9 DISTRICT OF ARIZONA

10 In Re Bard IVC Filters Products
Liability Litigation

No. MD-15-02641-PHX-DGC

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**REPLY AND OBJECTION TO
RESPONSE OF FREESE & GOSS AND
MATTHEWS & ASSOCIATES IN
OPPOSITION TO THE MOTION TO
FILE UNDER SEAL FILED BY
PLAINTIFFS' CO-LEAD COUNSEL AND
THE PLAINTIFFS' EXECUTIVE
COMMITTEE AND SUBSEQUENT
JOINDERS**

18 Plaintiffs' Co-Lead Counsel and Plaintiffs' Executive Committee (hereafter
19 collectively "PEC") file this Reply and Objection to Response of Freese & Goss and
20 Matthews & Associates in Opposition to the Motion to File Under Seal Filed by Plaintiffs'
21 Co-Lead Counsel and the Plaintiffs' Executive Committee and Subsequent Joinders.

22 **I. It was appropriate to file the Recommendation to Appoint Common**
23 **Benefit Fee and Cost Committee under seal.**

24 Filing the Recommendation to Appoint Common Benefit Fee and Cost Committee
25 (hereafter "Recommendation") under seal is appropriate and necessary to shield the
26 document from Defendants who have no standing to object or respond to such a
27 recommendation. The filing followed an *ex parte* conversation with the Court held on
28 February 4, 2020. The Court was aware the Recommendation would be submitted and
understood the need to file under seal—the Court even issued a sealed minute entry

1 directing Co-Leads and the PEC to submit the Recommendation. As such, the concerns
2 set forth in the Response of Freese & Goss, et al. should be alleviated.

3 Furthermore, the issues of transparency raised by Freese & Goss, et al. are
4 unfounded. “Participating Counsel,” as defined in Case Management Order No. 6 (Doc.
5 372, hereinafter “CMO 6”), have been provided with a copy of the Recommendation and
6 were notified of the intent of the Co-Leads and PEC to start the process of cost
7 reimbursement and initial partial fee allocation. No recommendation regarding fee or
8 cost allocations has been made to the Court and no work has begun in making any such
9 recommendation.

10 **II. The PEC opposes the appointment of Tim Goss,**

11 The Co-Lead Counsel and the PEC opposes the request that Tim Goss be appointed
12 to the Common Benefit Fee and Cost Committee (“Committee”).

13 The Recommendation includes a proposed representative slate of appointees to the
14 Committee. Decisions regarding fees and cost allocation belong to Co-Lead Counsel
15 under CMO 6 (Doc. 372). Co-Lead Counsel engaged the PEC on this issue and included
16 the PEC in final decisions for the proposed slate of members, which is diverse and
17 inclusive. The proposed members were agreed to unanimously by the PEC and Co-Lead
18 Counsel and approved by the Special Master whose court appointment is based on
19 providing “fairness, consistency, objectivity, and experienced oversight” on common
20 benefit fees and cost matters. (Doc. 6404). The final approval will come from the Court.

21 Mr. Goss did not have substantial involvement in any aspect of the litigation. The
22 trials, appeals and other experience attributed to Mr. Goss stem from his involvement in
23 unrelated IVC MDLs. While neither Co-Lead Counsel nor the PEC deny Mr. Goss’
24 experience in cases against non-Bard IVC filter manufacturers, it does not uniquely
25 qualify him to provide insight on the time and costs expended in bringing claims against
26 Bard; nor does his negotiation of a settlement that did not involve the Co-Leads or the
27 PEC who *are* most familiar with the time and cost involved in the Bard litigation.
28 Moreover, the terms of that settlement are unknown to Co-Lead Counsel, the PEC, the

1 Special Master or the Court, and therefore inconsequential in determining any alleged
2 common benefit it provided to Plaintiffs and Participating Counsel.

3 Proposed members, on the other hand, are particularly suited to serve on the Fee
4 and Cost Committee. Co-Lead Counsel and the PEC considered the layers of common
5 benefit work performed (e.g., discovery, trial, ESI, bellwether trials, motion practice,
6 remands, appeals, etc.), the timespan of the work performed, and the separate tracks of
7 litigation in the MDL (e.g., medical monitoring, class action, product liability litigation,
8 preemption litigation, trial work, etc.). The objective was to limit the number of
9 participants while still ensuring a representative membership. The lawyers who are
10 recommended to participate on the Committee also participated in all layers and tracks of
11 common benefit work and possess an in-depth understanding of the work performed
12 throughout the litigation. Co-Lead Counsel and the PEC are in the best position to
13 determine the composition of the Committee having been involved in all aspects and
14 layers of the litigation themselves. Moreover, under CMO 6, Co-Lead Counsel have sole
15 authority to make a recommendation of fee and cost distributions to the Court at the
16 appropriate time yet decided, in the spirit of fairness and transparency, to engage the PEC
17 in the selection of a diverse committee that will assist with that recommendation.

18 **III. Filers of Joinders did not perform common benefit work.**

19 Finally, neither Marc J. Bern & Partners LLP nor Blankenship Law Firm who have
20 filed Joinders regarding this issue (Docs. 21443 and 21446 respectively), performed
21 common benefit work in this litigation. No attorney from Marc J. Bern & Partners LLP
22 has performed any common benefit work nor have they served in any position in
23 Plaintiffs' Leadership Counsel, and the firm has not laid out any common benefit costs.

24 While William F. Blankenship of Blankenship Law Firm has performed common
25 benefit work, all such work was performed solely during his time with Freese &
26 Goss—whose submitted time and costs, if any, will be fairly addressed by the committee
27 this Court approves in consultation with the Special Master appointed specifically to assist
28 with the fair, objective, and consistent oversight of these matters. As with Marc J. Bern &

1 Partners LLP, neither Mr. Blankenship nor any member of his current firm has held any
2 position within the Plaintiffs' Leadership Counsel, no common benefit work was
3 performed by any attorney of Blankenship Law Firm while that attorney was practicing
4 with Blankenship Law Firm, and the firm has not laid out any common benefit expenses.
5 The Court should not place any weight on their submissions.

6 RESPECTFULLY SUBMITTED this 14th day of February 2020.

7 BEUS GILBERT MCGRODER PLLC

8 By: /s/ Mark S. O'Connor

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February 2020, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

/s/ Jessica Gallentine